

2003

Bryan Taylor v. The Public Service Commission of Utah and PacificCorp : Brief of Petitioner

Utah Court of Appeals

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Recommended Citation

Legal Brief, *Taylor v. Public Service Commission of Utah*, No. 20030694 (Utah Court of Appeals, 2003).
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IN THE UTAH COURT OF APPEALS

Bryan Taylor,

Petitioner

vs.

The Public Service Commission of Utah and)
Case

PacifiCorp,

Respondents

Petitioner's Brief

Utah Court of Appeals

20030694-CA

Brief of Petitioner

Petition for Review of Public Service Commission Order Docket No. 03-035-05

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UTAH APPELLATE COURTS

MAY 21 2004

)	
Bryan Taylor,)	Petitioner's Brief
)	
Petitioner)	
vs.)	
)	
The Public Service Commission of Utah and)		Utah Court of Appeals
Case		
PacifiCorp,)	# 20030694-CA
Respondents)	

Petition for Review of Public Service

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<i>Stivers v.Nevada State... Licensing Board</i> , 71, F. 3d 732, 741(9 th Cir, 1995	6

Rules

R746-310-4 D

Statutues

Utah State Constitution, Art. 1, Sec. 1, 7, 11, 22	2, 6, 8
UCA § 63-46b-16	2,6,8,12
UCA § 57-9-2, 3	2
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UCA § 54-4a-1, 54-4-2, 54-7-25, 54-4-7, 54-4-18, 54-4-23, 54-10-6	2

Other Authorities

Electric Service Regulation 6	6, 9
NESC 218	9, 10, 11

Jurisdiction

This Court has jurisdiction pursuant to Utah Code Ann. §78-2a-3(2)(a).

Statement of Issues

Issue 1: The PSC order as it stands violates the Petitioners constitutional rights regarding property. Further, the order violates Petitioner's due process rights by improperly placing the burden of proof on the Petitioner and denying a review and rehearing providing pertinent new information and testimony, this despite acknowledging a need for more information in the order. Further, the Commission exhibited bias by showing undue deference to PSC testimony. Therefore the order is unconstitutional and this is a question of general law.

Standard of Review: Correction of Error

Issue 2: The PSC has erred in its finding of facts, since they are not supported by substantial evidence in this case. This is a question of law requiring the PSC to require substantial evidence from the Utility.

Standard of Review: Correction of Error

Issue 3: The PSC order doesn't logically follow from its own findings of fact and actually contradicts its findings.

Standard of Review: Correction of Error

Issue 4: The PSC has erred by ignoring property law concerning easements.

Standard of Review: Correction of Error

Issue 5: The PSC order allows for irreparable and unnecessary harm to the Petitioner's property.

Standard of Review: Correction of Error

Issue 6: Despite evidence and testimony raising questions about this and other PacifiCorp practices, past and present, the PSC failed to fulfill its duty to act or investigate.

Standard of Review: Intermediate

Determinative Law

Issue 1: Utah State Constitution, Art. 1, Sec. 1, 7, 11, 22

Issue 2: UCA § 63-46b-16

Issue 3: UCA § 63-46b-16

Issue 4: UCA § 63-46b-16, UCA § 57-9-2, 3

Issue 5: UCA § 12, 12.1 and § 63-46b-16

Issue 6: UCA § 54-4a-1, 54-4-2, 54-7-25, 54-4-7, 54-4-18, 54-4-23, 54-10-6

Statement of the Case

A. Nature of the Case:

This is a case resulting from what should have been a relatively minor issue with the use of reasonable judgment and discretion on the part of PacifiCorp's tree trimming. However what the Petitioner experienced and observed was an extreme level of arrogance and hubris and a dishonest representations by PacifiCorp.

The Petitioner being a licensed general contractor is experienced working around electricity and familiar with the properties and safety issues associated with electricity. Further, the Petitioner has extensive experience working for a major equipment vendor to utilities and as a consultant regarding least cost routing of energy under deregulation. Given this background the Petitioner had a number of "red flags" go up in his mind with each subsequent conversation with PacifiCorp. The Petitioner then took his issues to the Public Service Commission (PSC).

In subsequent proceedings with the PSC it demonstrated a cavalier and insincere attitude towards the Petitioner's claims, inappropriate deference and bias towards the utility.

B. Course of Proceedings

April 8, 2003 a formal complaint was filed with the PSC.

May 29, 2003 Hearing before PSC Judge Tingey.

June 17, 2003 Report and Order from PSC

June 7, 2003 Petition for Rehearing

????? Rehearing denied (PSC never responded)

August 28, 2003 Petition for Review and Stay to Supreme Court

September 29 & 30, 2004 Report and Order (Procedural Order)

October – Present Various stays, motion for stays, mediation

C. Statement of Facts

1. February 2003 the Petitioner found a notice regarding PacifiCorp plans for tree trimming. The Petitioner had no concerns at this time based on previous experience with utility trimming at previous residence.
2. Late February the Petitioner happen to be home and was shocked by the first cuts near the street curb. Upon questioning the crew leader, the leader showed the petitioner a diagram indicating the clearance they intended to cut. **This would have effectively topped 30-40 trees with most all likely dying.** Petitioner requested they stop work and send out supervisor.
3. May 6 - 25, 2003 Butch Bryant and Rich Buelte come multiple times under the guise of “appeal process”. **First they agree not to do any additional trimming until the “appeal process” is completed. This agreement was violated in one week.** They merely provided an apology. Then they made

ridiculous assertions and exaggerated safety claims (must have thought I knew nothing about electricity). This was followed by arrogant and hubristic claims regarding their unfettered rights to basically cut anything they wanted.

4. May 25, 2003 I receive a letter stating PacifiCorp will come cut Petitioner's trees despite my objections. This letter made reference to the rules giving them the right. After studying the letter, rules, statutes, etc. it is clear PacifiCorp rights are limited if properly regulated and governed.
5. April 8, 2003 a formal complaint was filed to prevent tree trimming pending a hearing. The "Course of Proceedings" follows from here.

Summary of Argument

This argument stems from PacifiCorp's self serving abuse of rights provided thru legislative rules, tariffs and etc. They do this through self established guidelines and practices that trample the constitutional property and due process rights of the citizenry. PacifiCorp's hubris in these endeavors is then emboldened by the PSC's failure to properly place the burden of proof and the requirement for substantial evidence for these guidelines and practices upon the utility. The PSC appears to have forgotten they are the "Public's" Commission and not the "Utility's" Commission. Either through improper political influence, lack of manpower or money, or due to relationships/friendships developed with the Utility's liaisons to

the PSC, the PSC seems to have lost its objectivity and will to act against PacifiCorp.

Argument

Argument 1: The petitioner never envisioned the need to come this far to receive fair and impartial treatment in efforts to protect his property. The Petitioner came to the May 29, 2003 hearing believing the PSC role was to regulate the Utility and knowing the dispute centered on the Petitioner's efforts to protect his real and valuable property from illegal and unnecessary destruction by the PacifiCorp. Therefore, the rightful expectation was that any and all burden of proof should be on PacifiCorp and the Petitioner would receive the discretion afforded under due process. These rights are clearly established by the Federal and Utah Constitutions (see Utah Cons. Art. 1, 7). The placement of the burden of proof and substantial evidence is further set by UCA § 63-46b-16, *Brunell v. Industrial Comm.* 740 P. 2d 1331, 1333 Utah 1987, *Stivers v. Nevada State... Licensing Board*, 71, F. 3d 732, 741(9th Cir, 1995); *Inre Murcheson*, 349 U.S. 133, 136 (1955). The Electric Service Regulation No. 6 (c) says "the customer shall permit the Company to trim trees.....to the **extent necessary**"

Therefore the Petitioner came to the hearing prepared with many photographs (picture being worth a thousand words) clearly showing that the clearances

(guidelines) sought had not existed for at least 30 years. During this time there had been no history/record of safety or service outages associated with these trees. Therefore PacifiCorp's guidelines could not possibly be proofed to be necessary. Contrary to these expectations and rights, the Petitioner found and received quite the opposite. Comments from the June 17th Order (R at 40 (6-7)) "there is not sufficient evidence to support standards different from PacifiCorp's", "we have reason to believe less....would be sufficient", "we will allow PacifiCorp to trim to the extent necessary and strongly encourage to cut less." Further it states "we do not have sufficient to state what smaller clearance is required", yet the PSC then denied a rehearing with the opportunity to get additional **independent** evidence. They further failed to conduct there own independent investigation as is there duty for deciding issues.

In addition, the impartiality is further brought into question by other factors. The morning of the hearing I happened to get on a elevator, going up to the PSC, including two individuals who were, in relation to the day's hearing, commenting and joking about the Petitioner's claims in negative light. The elevator became quiet when I was identified as the Petitioner. Unbeknownst to me one of these individual turned out to be Judge Tingey. Further, the Petitioner through site inspection and study of title and clerk recorders should be able to have reasonable expectation of any encumbrances. By disregarding the history of past practices,

given the drastic change the PSC has violated these basic expectations regarding the Petitioner's real property. Standards and practices change over time in many industries, but not at the expense of Constitutional property rights without just compensation (Utah Cons. Art. 1, 22). A good example is the evolution of building codes. Earthquake, plumbing, electrical, etc. have all changed for safety reasons, but despite most all residences in SLC not meeting these standards we don't require residences to retroactively comply despite the significant earthquake safety hazards. The PSC's order is inappropriately placing the burden of PacifiCorp's own guidelines on the Petitioner for the benefit of PacifiCorp. This is despite there not being any national clearance distance standard (Exhibit B, R at 50). The PSC order clearly states these guidelines are not officially approved. Therefore the Petitioner finds his due process and burden of proof violated by the PSC order and this is unconstitutional.

Argument 2: The PSC has erred in its finding of facts given the requirement for "substantial evidence" on the part of PacifiCorp. This requirement is established by UCA § 63-46b-16(4), *Savage Indus. V. Tax Commission* 811 P. 2d, 664 (Utah 1991), *Questar Pipeline v. Tax Comm.*, 817 P. 2d 316 (Utah 1991). Quotes from these case are: "substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"; "substantial

evidence test is different than ‘some’ evidence test”; “the ‘substantial evidence test’ is both qualitative and quantitative inquiry”. The Petitioner will show “the marshalling of evidence supporting” the order fails the “substantial evidence test.”

The marshalling of facts in support are as follows: PacifiCorp claims Electric Serv. Reg. No. 6 gives them the right. They claim guidelines are the “extent necessary” and UAC § R760-310-4 D (R at 77) obligate PacifiCorp to comply with NESC 218 (R at 79). Mr. Miller testified that their guidelines meet these requirements. He further testified that the trimming is practical (R at Hearing transcript p.79). Mr. Miller testified that their trimming complies with ISA and cited qualifications as an arborist (R at “hearing transcript p. 9-10, 16). He testified that historical practices were not relevant (R at transcript p. 30). He testified several places that practices comply with ANSI 300 and these represent “industry best practices”. PacifiCorp’s attorney’s, in closing arguments (R at transcript p. 87-88) claim rights based on Tariff and dismiss relevance of not having an easement and indicate they would prevail under eminent domain.

Contrary to the supporting evidence above the Petitioner asserts the following: The trimming guidelines are in excess of what is necessary. The guidelines are arbitrary and established by the same individual testifying in support of the PSC guidelines. Therefore the evidence is not objective, independent or supported by

any hard facts. The only hard facts are the physical evidence on site and the historical record. The site evidence provided through submitted photos (R at 210-223) or an actual visit to the site clearly show the clearance sought has not existed for 15 to 30 yrs. This fact has been admitted by PacifiCorp representatives in site visits to Petitioner's home. Further, there is no record or evidence that these trees have caused any safety or outage problems. These facts provide tremendous empirical evidence and combining these facts clearly indicate the trimming sought is beyond necessary. We strongly believe that a "reasonably minded" person would find PacifiCorp guidelines more than necessary and this is supported by comments in the June 17th order "we have reason to believe something less would be sufficient". Regarding ISA standards and proper arborists practices, the 1st rule is that trimming should be regular and frequent to keep growth in check (i.e. don't try and trim 15 years of growth at once). It is well documented that this is the case here. Mr. Buelte agrees that if the trees had been periodically trimmed they would not be in danger of dying with the proposed trimming (R at transcript p. 51). Mr. Miller admits to the industries involvement the ISA and ANSI standards (R at transcript p. 39-40) and further admits he established the program to advantages to PacifiCorp and the distances are arbitrary (R at transcript p. 38 & 46). Once again this evidence is neither real (hard) or objective. Regarding the NESC 218 standard, the court should note that a clearance distance less than PacifiCorp's will

also meet the standard. Regarding NESC 218 A (2), Mr. Miller testifies trimming very practical in this case (R at transcript p. 79). **It is clear from reading that his perspective is not objective.** The Petitioner asserts that if the trimming destroys his valuable real property and tramples his Constitutional property rights the trimming is not practical because it is illegal. Therefore PacifiCorp should comply with UCA § R746-310-4 D and NESC 218 by an placing the lines underground. Regarding trimming that already took place; the Petitioner questions the quality of Mr. Miller's qualifications and testimony. Mr. Millar identified in testimony and exhibit (R at 204) the tree as a Plum tree. In fact it is a Beech tree. He testifies the tree is not topped and properly trimmed (R at transcript p.77) but this contradicts the his own exhibits (R at 92 and 140). In testimony, he disagrees with Petitioner's comments from other arborists that the tree will likely die (R at 78). The Court should see new photo exhibit of "The nearly dead tree" take this spring, one year after PacifiCorp trimming.

The Petitioner believes the court should see that the substantial evidence test has not been met by PacifiCorp and in fact there is substantial evidence to the contrary.

Argument 3: The PSC has erred by issuing an order that doesn't follow logically there own findings of fact. The PSC, in the June 17th order, believes something less is sufficient. Further, the PSC order acknowledges the clearances are not approved. But they essentially say PacifiCorp can trim whatever they deem

necessary. This is an abuse of discretion and the law which obligates them to regulate.

Argument 4: The PSC has erred by ignoring property law concerning easements. The PSC may not have the authority to determine the extent of prescriptive easement rights (see June 17th order). However, in light of the facts as they exist it is improper not to have considered these laws. There is no easement and PacifiCorp provided no evidence to the contrary. Common Law regarding prescriptive rights clearly indicate historical use is primary in defining these rights. Therefore the PSC should have considered the historical maintenance of this corridor by PacifiCorp. Further, it has been admitted by PacifiCorp personnel at the site that historically “trimming was done with permission.....if a homeowner didn’t want something trimmed then we usually didn’t trim”. This permission fact either negates any prescriptive right or establishes permission by the property owner as the boundary for any prescriptive right.

Argument 5: The PSC has erred in its June 17th order since it will result in significant and irreparable harm to the petitioner’s property. Therefore the Petitioner is being substantially prejudiced by the order UCA § 63-46b-4. This should be corrected since all the issues have not been resolved, and the agency has erroneously applied the law regarding burden of proof and substantial evidence.

Argument 6: Despite evidence now known to the PSC they have failed to act to regulate or investigate. They found as fact that PacifiCorp was not properly representing there rights and claims of approve clearances with there customers, but didn't order them to stop. PacifiCorp testified they had a 3yr trim cycle yet had know explanation as to why this clearly was not the case anywhere in the Salt Lake Valley and despite Mr. Miller running the program for the past 10 years (R at transcript). The PSC should investigate the accounting of tree trimming and if they have been properly allocated in the rate base.

Conclusion

The Court at a minimum should reverse the PSC order and require the trimming be done in accordance with Petitioner's previous willingness or require PacifiCorp to incur the cost of burying the lines to meet their obligations.

Further, PacifiCorp should be required to fairly compensate the Petitioner for the improperly trimmed Beech tree. PacifiCorp should be required in their notification procedures to have actual communication with property owners when significant trimming is desired. A real and substantive appeal process should be provided, not the sham tl at exists today.

Proof of Service

I certify that 2 copies of the "Petitioner's Brief" has been sent to each of the following parties via the U.S. Mail Service.

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Petitioner's Signature

A handwritten signature in black ink, appearing to read "Bryan Taylor". The signature is written in a cursive, flowing style.

Addendum

Article I, Section 1. [Inherent and inalienable rights.]

All men have the inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess and protect property; to worship according to the dictates of their consciences; to assemble peaceably, protest against wrongs, and petition for redress of grievances; to communicate freely their thoughts and opinions, being responsible for the abuse of that right.

Article I, Section 7. [Due process of law.]

No person shall be deprived of life, liberty or property, without due process of law.

Article I, Section 11. [Courts open -- Redress of injuries.]

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

Article I, Section 22. [Private property for public use.]

Private property shall not be taken or damaged for public use without just compensation.

63-46b-16. Judicial review -- Formal adjudicative proceedings.

(1) As provided by statute, the Supreme Court or the Court of Appeals has jurisdiction to review all final agency action resulting from formal adjudicative proceedings.

(2) (a) To seek judicial review of final agency action resulting from formal adjudicative proceedings, the petitioner shall file a petition for review of agency action with the appropriate appellate court in the form required by the appellate rules of the appropriate appellate court.

(b) The appellate rules of the appropriate appellate court shall govern all additional filings and proceedings in the appellate court.

(3) The contents, transmittal, and filing of the agency's record for judicial review of formal adjudicative proceedings are governed by the Utah Rules of Appellate Procedure, except that:

(a) all parties to the review proceedings may stipulate to shorten, summarize, or organize the record;

(b) the appellate court may tax the cost of preparing transcripts and copies for the record:

(i) against a party who unreasonably refuses to stipulate to shorten, summarize, or organize the record; or

(ii) according to any other provision of law.

(4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

(a) the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied;

(b) the agency has acted beyond the jurisdiction conferred by any statute;

(c) the agency has not decided all of the issues requiring resolution;

(d) the agency has erroneously interpreted or applied the law;

(e) the agency has engaged in an unlawful procedure or decision-making process, or has

failed to follow prescribed procedure;

(f) the persons taking the agency action were illegally constituted as a decision-making body or were subject to disqualification;

(g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;

(h) the agency action is:

(i) an abuse of the discretion delegated to the agency by statute;

(ii) contrary to a rule of the agency;

(iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency; or

(iv) otherwise arbitrary or capricious.

57-9-2. Rights and interests to which marketable record title is subject.

The marketable record title is subject to:

(1) all interests and defects which are inherent in the muniments of which such chain of record title is formed, except that a general reference in the muniments or any of them, to easements, use restrictions, or other interests created prior to the root of title is not sufficient to preserve them, unless specific identification is made therein of a recorded title transaction which creates the easement, use restriction, or other interest;

(2) all interests preserved by the filing of proper notice or by possession by the same owner continuously for a period of 40 years or more, in accordance with Section 57-9-4;

(3) the rights of any person arising from prescriptive use or a period of adverse possession or user, which was in whole or in part subsequent to the effective date of the root of title;

(4) any interest arising out of a title transaction which has been recorded subsequent to the effective date of the root of title from which the unbroken chain of title of record is started, except that the recording does not revive or give validity to any interest which has been extinguished prior to the time of the recording by the operation of Section 57-9-3; and

(5) the exceptions stated in Section 57-9-6 as to rights of reversioners in leases, as to apparent easements and interests in the nature of easements, as to the right, title, or interests of the state in school or institutional trust lands or sovereign lands, and as to interests of the United States.

57-9-3. Marketable record title held free and clear of interests, claims, and charges.

Subject to Sections 57-9-2 and 57-9-6:

(1) the marketable record title shall be held by its owner and shall be taken by any person dealing with the land free and clear of all interests, claims, or

charges, whatsoever, the existence of which depends upon any act, transaction, event, or omission that occurred prior to the effective date of the root of title; and

(2) all such interests, claims, or charges, however denominated, whether legal or equitable, present or future, whether the interests, claims, or charges are asserted by a person sui juris or under a disability, whether the person is within or without the state, whether the person is natural or corporate, or is private or governmental, are declared to be void.

R746-310-4. Station Instruments, Voltage and Frequency Restrictions and Station Equipment.

A. Station Instruments -- Utilities shall install the instruments necessary to obtain a record of the load on their systems, showing at least the monthly peak and a monthly record of the output of their plants. Utilities purchasing electrical energy shall install the instruments necessary to furnish information regarding monthly purchases of electrical energy, unless those supplying the energy have already installed instruments from which that information can be obtained.

Utilities shall maintain records indicating the data obtained by station instruments.

B. Voltage and Frequency Restrictions --

1. Unless otherwise directed by the Commission, the requirements contained in the 1995 edition of the American National Standard for Electrical Power Systems and Equipment-Voltage Ratings (60 Hz), ANSI C84.1-1995 (R2001), incorporated by this reference, shall be the minimum requirements relative to utility voltages.

2. Utilities shall own or have access to portable indicating voltmeters or other devices necessary to accurately measure, upon complaint or request, the quality of electric service delivered to its customer to verify compliance with the standard established in Subsection R746-310-4(B)(1). Utilities shall make periodic voltage surveys sufficient to indicate the character of the service furnished from each distribution center and to ensure compliance with the voltage requirements of these rules. Utilities having indicating voltmeters shall keep at least one instrument in continuous service.

3. Utilities supplying alternating current shall maintain their frequencies to within one percent above and below 60 cycles per second during normal operations. Variations in frequency in excess of these limits due to emergencies are not violations of these rules.

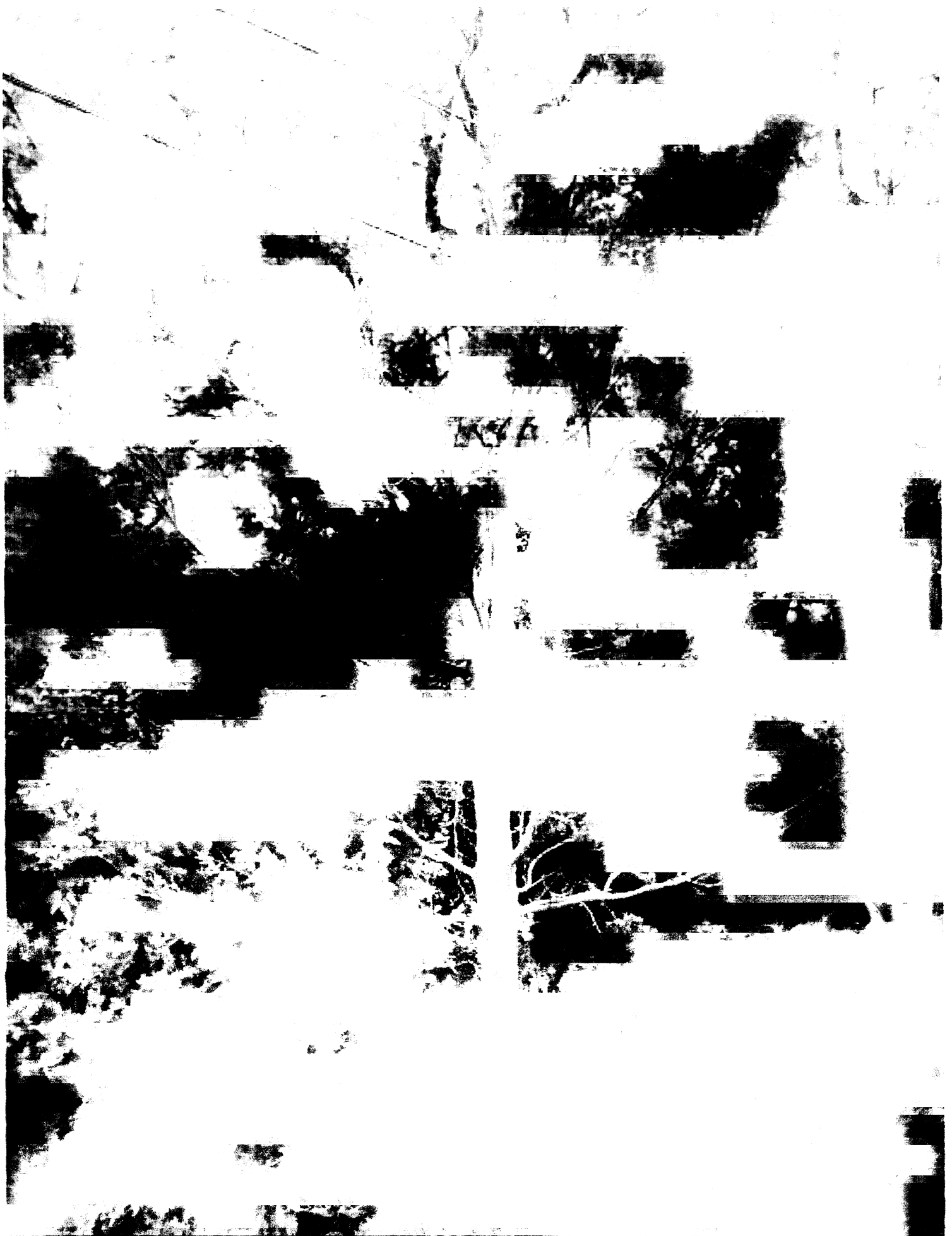
C. Station Equipment --

1. Utilities shall inspect their poles, towers and other similar structures with reasonable frequency in order to determine the need for replacement, reinforcement or repair.

D. General Requirements -- Unless otherwise ordered by the Commission, the requirements contained in the National Electrical Safety Code, as defined at R746-310-1(B)(13), constitute the minimum requirements relative to the following:

1. the installation and maintenance of electrical supply stations;

2. the installation and maintenance of overhead and underground electrical supply and communication lines;
3. the installation and maintenance of electric utilization equipment;
4. rules to be observed in the operation of electrical equipment and lines;
5. the grounding of electrical circuits.



"The Almost Dead Tree"